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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 325

ANNA C. McCARTHY, MYRON E. PIERCE,
ALFRED P. LOWELL, ET AL.,
Appellants,

vs.

THE CITY OF BOSTON

APPEAL FROM THE SUPERIOR COURT OF THE COMMONWEALTH OF MASSACHUSETTS FOR THE COUNTY OF SUFFOLK

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

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OCTOBER TERM, 1948

No. 325

ANNA C. McCARTHY, ET AL,

Appellants,

vs.

THE CITY OF BOSTON,

Appellee

STATEMENT OPPOSING JURISDICTION

The City of Boston, appellee in the above-entitled appeal, believing that the matter set forth below will demonstrate that its motion to dismiss or affirm should be allowed, files this, its statement in opposition to appellant's statement as to jurisdiction.

This case was tried in the Superior Court of Massachusetts with two other petitions in equity, *Lowell et al.* v. *City of Boston et al., and Pierce et al.* v. *City of Boston.* Each petition sought to enjoin the City of Boston from contracting with a private corporation for the construction of a garage under Boston Common, and from executing a lease of the garage to said corporation.

The *Lowell* case was brought by more than ten taxpayers, pursuant to Mass. G. L. (Ter. Ed.) c. 40, s. 53, to enjoin the acts referred to on the theory that the City is about to incur

unlawful obligations. Petitioners alleged that the City was about to contract for the said garage pursuant to authority granted it by Mass. St. 1946, c. 294, which petitioners assert to be repugnant to the contract clause of the United States Constitution (Art. I, s. 10), and also to Art. X of the Constitution of Massachusetts.

The *Pierce* and *McCarthy* cases were each brought by more than ten taxpayers, by leave of court granted under Mass. G. L. (Ter. Ed.) c. 214, s. 3, cl. 11. These petitions allege that the City holds legal title to Boston Common upon certain trusts for the public and that the City is about to commit acts in breach of said trusts. Each petition prays that the trust be determined, and acts in violation thereof restrained. Neither petition mentions Mass. St. 1946, c. 294, nor asserts the repugnancy of that statute to United States Constitution, Art. I, s. 10.

The Superior Court, after a finding of facts, reported all three cases, without decision, to the Supreme Judicial Court, whose opinion is a part of the papers herein. The rescript of that court ordered decrees dismissing the bills in all three cases, and, in addition, ordered in the *Pierce* case a declaratory judgment ". . . that the City has title to the Common and the Public Garden subject to an easement in favor of the general public for the purposes of a public park." Decrees were entered in the Superior Court on June 8, 1948, pursuant to the rescript. From those decrees in the *Pierce* and *McCarthy* cases, appeals are now brought to this Court. No appeal was taken in the *Lowell* case.

I. This Court Has No Jurisdiction of This Appeal Unless the Record Shows That the Decision Below Upheld the Validity of Mass. St. 1946, c. 294.

Jurisdiction of this Court in this case is asserted by appellant to exist under the following provisions of section 237 of the Judicial Code, 28 U. S. C. s. 344:

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"A final judgment or decree in any suit in the highest court of a state in which a decision could be had . . . where is drawn in question the validity of a statute of any state, on the ground of its being repugnant to the Constitution . . . of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon writ of error."

To establish jurisdiction, appellants must show:

(1) That in this suit the validity of Mass. St. 1946, c. 294, ". . . is drawn in question . . . on the ground of its being repugnant to . . ." the contract clause of the United States Constitution, Art. I, s. 10.

(2) That the decree appealed from is a decision in favor of the validity of that statute.

Mass. St. 1946, c. 294, authorizes the City of Boston to contract with a private corporation for the construction, at no cost to the City, of a garage under Boston Common, and to lease the garage to the said corporation for a term not exceeding forty years.

Appellants now claim that the statute impairs the obligation of a contract in violation of U. S. Const., Art. I, s. 10. The contract said to be impaired is an alleged trust for the public subject to which, it is claimed, the City now holds title to the Common.

Plainly, this Court has no jurisdiction of this appeal unless the decision below gave effect to Mass. St. 1946, c. 294.

". . . when the state court, either expressly or by necessary implication, gives effect to a subsequent law of the state whereby the obligation of the contract is alleged to be impaired, a Federal question is presented. . . . But if there be no such law, or if no effect be given to it by the state court, we cannot take jurisdiction . . ."

(*Crosslake Club* v. *Louisiana*, 224 U. S. 632, 638-639).

"This court . . . has no jurisdiction to review a judgment of the highest court of a state, on the ground that a contract has been impaired, unless some legislative act of the State has been upheld by the judgment sought to be reviewed . . ."
(*New Orleans Waterworks* v. *Louisiana Sugar Co.*, 125 U. S. 18, 30).

Accord:
Wilson v. *Cook*, 327 U. S. 474, 480-481;
Long Sault Development Co. v. *Call*, 242 U. S. 272, 276-278, 280;
Missouri & Kansas Interurban Ry. Co. v. *Olathe*, 222 U. S. 187, 190.
Bacon v. *Texas*, 163 U. S. 207, 226-227;
Kreiger v. *Shelby R. R. Co.*, 125 U. S. 39, 46.

II. Appellants' Assignments of Error, Nos. 1, 2, 3, 4, 5 and 7, Fail on Their Face to State Errors Within the Appellate Jurisdiction of This Court, Because They Fail to State That the Court Below Gave Effect to Mass. St. 1946, c. 294.

Assignment of Error No. 1 goes to the whole decree, completely fails in specification, and must be disregarded. *Stickney* v. *Kelsey*, 209 U. S. 419, 420, *Seaboard Airline R. Co.* v. *Watson*, 287 U. S. 86, 90, 91.

Assignment No. 3 complains of the error of the court below in "failing to rule" that the acceptance by the City of the Parkman bequest created a trust with respect to Boston Common. That assignment states no question within the appellate jurisdiction of this court. The question whether or not a trust arose, and presently exists, is intrinsically within the exclusive jurisdiction of the State court, ". . . unless some legislative act of the State has been upheld . . ." *New Orleans Waterworks* v. *Louisiana Sugar Co.*, 125 U. S. 18, 30; *Bacon* v. *Texas*, 163 U. S. 207, 226-227; *Missouri & Kansas Interurban Ry. Co.* v.

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Olathe, 222 U. S. 187, 190; *Crosslake Club* v. *Louisiana,* 224 U. S. 632, 638-639; *Wilson* v. *Cook,* 327 U. S. 474, 480-481.

Assignments Nos. 2, 4, 5 and 7 are defective for a similar reason. They assert that "the Court below erred in *failing to rule* . . ." that Mass. St. 1946, c. 294, was invalid on various grounds. But section 237 of the Judicial Code, 28 U.S.C., s. 344, does not give this Court jurisdiction because of a "failure to rule" that a state statute is invalid. It gives jurisdiction only where "the decision is in favor of its validity".

This record shows affirmatively that the Court below, without referring to or relying upon Mass. St. 1946, c. 294, found that the acceptance by the City of the Parkman bequest gave rise to no trust of the land known as Boston Common. (Opinion, Mass. Adv. Sh. (1948) pp. 632-635.) Since this finding was fatal to petitioners' case, and in itself, without more, compelled the dismissal of the bill, the Court was never, in this case, required to rule and never did rule upon the validity of Mass. St. 1946, c. 294. It had, in the circumstances shown by this record, no obligation to pass upon the validity of that statute, since the petitioners' failure to prove that the Common is held in trust completely disposed of the case. Its "failing to rule" the statute invalid, therefore, is not on this record a "decision in favor of its validity", and does not raise a question within the jurisdiction of this Court.

A "failure to rule" a state statute invalid can give jurisdiction to this Court only where such "failure to rule" *necessarily* gives effect to such statute, and constitutes a "decision in favor of its validity", within the meaning of 28 U.S.C., s. 344. In the normal case of this type the *suit in the state court is authorized by the state statute* which is "drawn into question". The *defendant relies on a prior contract* which he says is impaired by the statute. In such a case, the entry of judgment for the plaintiff is a "failure

to rule" the statute invalid. Moreover, it necessarily gives effect to the statute, constitutes a "decision in favor of its validity", and therefore creates a case within the jurisdiction of this court. *Mobile & Ohio R. R. Co.* v. *Tennessee*, 153 U. S. 486, 492-495, and cases cited.

A slightly weaker case of the same type is that in which some essential factor of the plaintiff's cause of action, such as a demand, or administrative determination of liability, is made under authority of a state statute post-dating the contract relied upon by defendant and claimed by him to be impaired. In such a case the entry of judgment for plaintiff necessarily upholds the validity of the state statute. Accordingly, if the state court, in such a case, "fails to rule" the statute invalid, it *necessarily* gives effect to the statute, for its judgment could be entered on no other theory. *Carondelet Canal & Nav. Co.* v. *Louisiana*, 233 U. S. 362, 376-377. *Houston & I.C.R. Co.* v. *Texas*, 177 U. S. 66, 76-77.

In the case at bar the plaintiff relies, not on the statute alleged to impair a contract, but seeks to enforce the "contract" itself, i.e., an alleged trust of Boston Common. There are few cases of this type in which a mere failure to rule the statute invalid gives jurisdiction to this Court. If the state court dismisses such a suit on the ground that the alleged contract never existed, its failure to rule the statute invalid obviously does not give effect to the statute, and is not a "decision in favor of its validity".

Where, however, the record in such a case affirmatively establishes the existence of the contract relied upon the plaintiff, a failure to rule the subsequent statute invalid may constitute a "decision in favor of its validity". In *Bridge Proprietors* v. *Hoboken Company*, 1 Wall. 116, plaintiff was shown by the record to hold, under a New Jersey statute of 1790, an exclusive franchise to operate a toll bridge for the passage of pedestrians and vehicles.

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Plaintiff sued to restrain the erection by defendants of a railroad bridge at the same location. Defendants were acting under a franchise granted by a New Jersey statute of 1860. The state court dismissed the bill on the ground that the word "bridge", as used in the grant of 1790, did not, fairly construed, include the type of structure to be constructed by defendants. The state court in terms rested its decision on a construction of the original grant of 1790, and did not purport to give effect to the statute of 1860. This Court held nevertheless, that the judgment below necessarily gave effect to the statute of 1860.

> ". . . The state court dismissed the bill on these pleadings alone. It could not have done this, without holding *the act of 1860* to be valid, as it *was the only authority on which the defendants rested their right to build any structure* over the Hackensack river. In holding that act to be valid, notwithstanding plaintiff's claim that it was void as impairing the obligation of their contract with the State of New Jersey, a decision was made within the very terms of the 25th section of the act of Congress of 1789." (*Bridge Proprietors* v. *Hoboken Company*, 1 Wall. 116, 144; emphasis supplied).

In the *Hoboken* case, unlike the case at bar, the existence of the contract relied upon by the plaintiffs was affirmatively established by the record. They were entitled to enjoin the building of defendant's bridge, as a nuisance causing special damage to them, unless defendants could show lawful authority to build it. Defendants could only show this by relying on the later statute of 1860. A decision dismissing the bill could only be justified by the 1860 statute, "the only authority on which the defendants rested their right to build any structure". Consequently, the decision below necessarily gave effect to the 1860 statute and gave rise to a case within the jurisdiction of this Court. Similar considerations justify the jurisdiction assumed in *Charles*

River Bridge v. *Warren Bridge*, 11 Peters 420, and in *Larson* v. *South Dakota*, 278 U. S. 429. Compare *Chenango Bridge Co.* v. *Binghampton Bridge Co.*, 3 Wall. 51, where the bill was brought by the grantee under the later statute, and the state court issued an injunction against the earlier grantee, thus necessarily giving effect to the later statute.

III. The Decision Below Does Not Expressly or Impliedly Give Effect to Mass. St. 1946, c. 294, Assignment of Error No. 6 Is Not Borne Out by the Record, and Therefore the Motion to Dismiss or Affirm Should Be Allowed.

Assignment of Error No. 6 is as follows:

> 6. That the court below erred in ruling that St. 1946 c. 294 was a valid exercise of the legislative power of the Commonwealth of Massachusetts.

The record shows that no such ruling was made by the Court below in this case. The Court below did not in this case decide in favor of the validity of Mass. St. 1946, c. 294, nor give it effect.

The decree in this case adequately rests on the finding made by the Court below that no trust of the land known as Boston Common resulted from the acceptance by the City of a bequest of money under the will of George Francis Parkman. (Opinion, Mass. Adv. Sh. (1948) pp. 632-635.) That finding in itself, without more, compelled a dismissal of the petition in this case. Since the decree rests on a finding entirely independent of Mass. St. 1946, c. 294, it does not impliedly give effect to the statute.

The petition in this case in no way draws into question the constitutionality of Mass. St. 1946, c. 294. It alleges the acceptance by the City in 1909 of a monetary bequest under the will of George Francis Parkman (Petition, par. 2) and alleges in vague terms that the city thereby became bound

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not to divert the Common from its previous uses, and that it is about to commit acts which violate that obligation. (Petition, par. 5.) The Petition in no way mentions Mass. St. 1946, c. 294. The Court found that no such obligation was imposed upon the City by its acceptance of the Parkman bequest. (Opinion, Mass. Adv. Sh. (1048) pp. 632-635.) That finding is sufficient in itself, without more, to compel a dismissal of the petition. No reference to or reliance on Mass. St. 1946, c. 294 is necessary to support that dismissal, and the decree, therefore, in no way gives effect to or holds valid Mass. St. 1946, c. 294. Since the decree rests in no way on Mass. St. 1946, c. 294, and would have been precisely the same had the statute never been passed (*Kreiger* v. *Shelby R. R. Co.*, 125 U. S. 39, 46; *Missouri & Kansas Interurban Ry. Co.* v. *Olathe*, 222 U. S. 187, 190), it does not, of course, impliedly give effect to the statute. Appellants, therefore, are driven to argue that the Opinion of the Supreme Judicial Court *expressly* gave effect to Mass. St. 1946, c. 294. The only portion of the Opinion which considers that statute occurs at pp. 626-632 of Mass. Adv. Sh. (1948). The remainder of the opinion neither considers nor rests in any way upon the statute. Pages 605-608 state the three cases before the Court. Pages 608-624 are concerned with the "controversy as to the nature of the title which the town obtained . . ." in 1634 (p. 610), including the question whether "the town took the land subject to a trust". (p. 620). On pages 624-626 occurs the holding that "the town has dedicated the Common and the Public Garden to the use of the public as a public park". (p. 624). As we have said, pages 626-632 deal with Mass. St. 1946, c. 294, and will be fully discussed below. After concluding its discussion of that statute, the Court passes to the *Pierce* case and the *McCarthy* case (the case at bar). (p. 632). Pages 632-635 are concerned with the trust of the Common alleged to have arisen from the City's acceptance

of the Parkman will. Pages 635-636 discuss the decrees to be entered in the three cases.

We now direct attention to the discussion by the Supreme Judicial Court, at pages 626-632, of the validity of Mass. St. 1946, c. 294. The following propositions will appear:

1. The Court's discussion of the validity of Mass. St. 1946, c. 294 is expressly limited by it to the Lowell case.

2. The discussion is confined to the validity of the statute under the Massachusetts constitution.

3. Occasion to discuss the validity of the statute arose in the Lowell case alone, because *the finding that the Common is held in trust is not sufficient in itself to justify a dismissal of the Lowell petition.* That petition relied on a dedication of the land, as well as on a trust, and alleged that the dedication would be infringed by Mass. St. 1946, c. 294, in violation of the Constitution of Massachusetts.

That the Court's discussion of the validity of Mass. St. 1946, c. 294, is confined to the *Lowell* case is made plain by the language of the opinion. The Court begins its discussion by a statement of Mass. St. 1946, c. 294 (pp. 626-628). It then stops to consider whether action by the City pursuant to Mass. St. 1946, c. 294, can on any theory amount to the incurring of an obligation within Mass. G. L. (Ter. Ed.) c. 40, s. 53, the statute under which the petition is brought. The Court resumes its consideration of the validity of St. 1946, c. 294, at the bottom of p. 629, with this sentence:

> "Still confining our discussion to the Lowell petition, we pass to a consideration of the validity of St. 1946, c. 294 . . ."

Not until the termination of that discussion does the Court pass to the *Pierce* and *McCarthy* cases (Bottom of p. 632).

The Lowell petition, unlike the other two, is not a bill to enforce a trust. It is brought under Mass. G. L. (Ter. Ed.) c. 40, s. 53:

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> "If a town or any of its officers or agents are about to raise or expend money or incur obligations purporting to bind said town for any purpose or object or in any manner other than that for and in which such town has the legal and constitutional right and power to raise or expend money or incur obligations, the supreme judicial or superior court may, upon the petition of not less than ten taxable inhabitants of the town, determine the same in equity, and may, before the final determination of the cause, restrain the unlawful exercise or abuse of such corporate power."

The gist of the case is not breach of trust but "unlawful exercise . . . of corporate power", *i.e.*, unlawful raising or expending of money or incurring of obligations. (Opinion, Mass. Adv. Sh. (1948) p. 605). The case is that action under Mass. St. 1946, c. 294, will constitute such abuse of corporate power, because the statute is unconstitutional. The unconstitutionality is urged on two grounds: (1) Mass. St. 1946 impairs a trust with respect to the common, (2) Mass. St. 1946, c. 294, unlawfully infringes a dedication of the Common by authorizing the conveyance of an interest therein to a private corporation for purposes of private profit. The finding that there is no trust with respect to the Common obviously disposes of the first ground upon which it is claimed that action by the City under Mass. St. 1946, c. 294 will be an abuse of corporate power under Mass. G. L. (Ter. Ed.) c. 40, s. 53. It does not dispose of the second ground. The Supreme Judicial Court did find that the Common had been *dedicated* to public uses. (Opinion, Mass. Adv. Sh. (1948) p. 624.) Plainly, the Court felt that it must meet the claim that Mass. St. 1946, c. 294, interfered with that dedication in violation of the State Constitution.

Such is the reason for the Court's consideration of the validity of Mass. St. 1946, c. 294. Naturally the discussion is confined to the *Lowell* case, since the other two cases are

completely disposed of by the finding that the Common is not held upon trust. Plainly, the discussion in no way touches upon the Federal Constitution, and is confined to the question of the validity of the statute under the Constitution of Massachusetts.

It thus appears clearly that the Supreme Judicial Court did not uphold the validity of or give effect to Mass. St. 1946, c. 294 in the case at bar. That conclusion is powerfully confirmed by the express refusal of the Court, in the companion *Pierce* case, which also depended solely upon proof that the Common is held upon trust, to grant the City's prayer for a declaration that the statute is constitutional. (Opinion, Mass. Adv. Sh. (1948) p. 635.) *The Court did not uphold, but expressly refused to uphold the validity of Mass. St. 1946, c. 294.* It follows that this Court has no jurisdiction of the Appeal, and that the Motion to Dismiss or Affirm should be granted.

Wilson v. *Cook*, 327 U. S. 474, 480-481.

Long Sault Development Co. v. *Call*, 242 U. S. 272, 276-278, 280.

Crosslake Club v. *Louisiana*, 224 U. S. 632, 638-639.

Missouri & Kansas Interurban Ry. Co. v. *Olathe*, 222 U. S. 187, 190.

Bacon v. *Texas*, 163 U. S. 207, 226-227.

Kreiger v. *Shelby R. R. Co.*, 125 U. S. 39, 46.

New Orleans Waterworks v. *Louisiana Sugar Co.*, 125 U. S. 18, 30.

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Conclusion

For the various reasons set forth above, it is submitted that appellee's motion to dismiss or affirm should be allowed with costs to the appellee.

Respectfully submitted,

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Assistant Corporation Counsel,
WILLIAM H. KERR,
Counsel for Appellee.

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SUPREME COURT OF THE UNITED STATES

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No. 325

ANNA C. McCARTHY ET AL.,

Appellants,

vs.

THE CITY OF BOSTON,

Appellee

MOTION TO DISMISS OR AFFIRM

Now comes the City of Boston, the appellee in the above-entitled appeal, and moves that said appeal be dismissed, or the decision and decree appealed from be affirmed, for the reasons set forth in the appellee's Statement Opposing Jurisdiction filed herewith.

JAMES W. KELLEHER,
Assistant Corporation Counsel,
and
WILLIAM H. KERR,
Counsel for Appellee.